Supreme Court, U.S.
FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1121

In The

Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MONROE and ANDREW P. MELONI, MONROE COUNTY SHERIFF,

Petitioners,

vs.

ANN WEBER and GARY J. WEBER,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

FARACI, GUADAGNINO,
LANGE & JOHNS
Counsel for Respondents
300 Times Square Building
Rochester, New York 14614
Telephone: (716) 325-5150

Stephen G. Schwarz, Esq.
Counsel of Record

Daily Record Corporation
Rochester, New York

(13231)

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QUESTIONS PRESENTED

1. Does the Fourth Amendment preclude prison officials from conducting a strip/body cavity search of an arrestee charged with a misdemeanor or other minor offense, unless the officials have a reasonable suspicion that the arrestee is concealing weapons or contraband, based upon the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest?

The Court below held that it does.

2. Should the Petitioner County of Monroe be held liable in damages pursuant to 42 U.S.C. sec. 1983 to respondent Ann Weber, for a strip/body cavity search conducted upon her at the Monroe County Jail pursuant to official jail policy as promulgated by the County Sheriff, respondent Meloni?

The court below held that the County was liable.

3. Was the unconstitutionality of petitioner Meloni's mandatory strip/body cavity search policy clearly established at the time of the search of respondent Ann Weber, thereby precluding any grant of immunity from damage liability to Meloni?

The court below held that the law was clearly established.

STATEMENT OF THE CASE

The instant case is a civil rights action commenced against petitioners (as well as other defendants) for the wrongful arrest and subsequent strip/body cavity search of respondent Ann Weber.[1] The strip/body cavity search was conducted at the Monroe County Jail which is operated by petitioners County of Monroe and Sheriff Meloni. The facts leading up to the arrival by Mrs. Weber at the jail are in dispute, although the court below did re-

[1] Respondent Ann Weber is the only plaintiff with a claim against petitioners. Respondent Gary Weber alleges claims only against other defendants in the action.

cite some of those disputed facts in its decision by way of background. Respondents will not attempt to restate the "facts" leading up to the arrest, although respondents do feel that the "facts" set forth in the petition are grossly misstated and not supported by the record below. If the Court is interested in a more impartial view of the disputed facts, reference is made to the "Background" section of the decision of the court below (Pages B-3 through B-6 of the Petition).

The facts which may be fairly characterized as "undisputed" are that Mrs. Weber, a middle aged mother of 8, was taken to the Monroe County Jail at approximately 4:00 A.M. dressed in a gown she had worn to her daughter's wedding earlier that day. She was charged with making a false report and resisting arrest, both misdemeanors under New York law. The testimony in the record indicates the the sheriff's deputies at the jail were not apprised of any of the background regarding the arrest but only of the charges. Mrs. Weber was then subjected to a strip/body cavity search, during which she was ordered to remove all of her clothing and then assume various postures to permit the visual inspection of her vaginal and rectal areas by a female attendant. The jail records also indicate that she was released less than one hour after her arrival at the jail.[2] Mrs. Weber and another witness also testified in the record that the jail was not crowded on this particular evening and that the two arrestees were not asked if they could make bail before the intrusive searches were con-

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[2] Petitioners have appended a document to the petition as Appendix "C" which is alleged to be proof that Mrs. Weber was not granted bail until 6:00 A.M. This document was not a part of the moving papers before the district court, but was attached to petitioners' brief to the court of appeals. Notwithstanding the inappropriateness of petitioners' submission of a document not in the record to this Court, the document does not add anything of substance to petitioners' argument. This document indicates that the "time in" to the jail was "0409" and "time out" was "0503". That bail wasn't actually posted until 6:00 A.M., if this is indeed what this document indicates, is hardly important.

ducted. Petitioners did not submit testimony from any jail employee who was present with Mrs. Weber that evening, but produced only a witness that testified to general procedures. Both petitioner Meloni and another jail employee did testify at their depositions that it was the policy of the jail to subject all arrestees, regardless of the offense charged, to strip/body cavity searches. The petition continues to defend the policy, indicating that it continues to be followed to this day.

In the district court, petitioners moved for summary judgment dismissing respondent's section 1983 claim against them claiming, *inter alia*, that the strip/body cavity search was not in violation of respondent's fourth amendment rights. Respondent cross-moved for partial summary judgment as to liability on the opposite theory. The district court held, in a written decision (appended to the Petition as pages A-1 through A-12) that *Block v. Rutherford*, ____U.S.____, 104 S.Ct. 3227 (1984), precluded substitution of the court's judgment for that of prison administrators, and that so long as the Sheriff thought it necessary for the security of the institution to conduct such searches of all arrestees, then the searches were, *ipso facto*, reasonable. (A-7).

The judgment of the district court was appealed by respondents. The court of appeals reversed the district court and directed the entry of partial summary judgment in favor of respondents on the issue of liability. Following the lead of six other circuits, the court adopted the "reasonable suspicion" standard for judging the propriety of strip/body cavity searches of arrestees charged with misdemeanor and lesser offenses. The court also held, pursuant to *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), that the County was liable in damages for injuries caused to Mrs. Weber by the Monroe County Jail mandatory strip search policy, and that Sheriff Meloni was not entitled to good faith immunity from a damage award based upon that policy.

SUMMARY OF ARGUMENTS

1. THE DECISION BELOW ADOPTING THE "REASONABLE SUSPICION" STANDARD IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT AND IS IN HARMONY WITH TEN OTHER DECISIONS FROM SIX DIFFERENT CIRCUIT COURTS OF APPEALS.

There is no split in the circuits with regard to the standard of reasonableness to be applied to strip/body cavity searches of arrestees charged with misdemeanors or lesser offenses.

2. THIS COURT HAS DENIED CERTIORARI IN THREE OTHER CASES WHICH APPLIED THE "REASONABLE SUSPICION" STANDARD TO SIMILAR SEARCHES.

In cases from the Fourth, Ninth and Fifth circuits where the "reasonable suspicion" standard was applied to strip/body cavity searches of minor offense arrestees, this Court denied petitions for certiorari, the first in 1981, and then again in 1985 and 1986.

3. PETITIONERS' ARGUMENTS OF FACTUAL ERRORS BY THE COURT BELOW DO NOT PRESENT VALID GROUNDS FOR THE EXTRAORDINARY AND DISCRETIONARY REVIEW THAT THEY SEEK.

Most of the factual arguments made by petitioners were rejected, after due consideration, by both courts below, and in any event, do not present issues deserving of review by this Court.

4. PETITIONER MELONI'S ARGUMENT REGARDING WHETHER THE COURT BELOW ERRED IN FINDING THAT THE APPLICABLE LAW WAS CLEARLY ESTABLISHED ON THE DATE OF THE SEARCH, IS NOT ONE WHICH IS LIKELY TO RECUR.

The question presented, whether the illegality of a blanket strip/body cavity search policy instituted against an arrestee on a

misdemeanor charge on June 19, 1983, was clearly established on that date is unique and unlikely to impact upon future decisions in this area.

5. THE REMAINDER OF PETITIONERS' LEGAL ARGUMENTS HAVE BEEN REJECTED BY BOTH COURTS BELOW AND DO NOT WARRANT SUPREME COURT REVIEW.

Petitioners argument that they are compelled by State Law to conduct strip/body cavity searches of all arrestees was rejected even by the district court and their other similar arguments as to immunity for constitutional violations allegedly granted under state law are contrary to an unbroken chain of authority from this Court and other federal courts and do not warrant review by this Court.

ARGUMENT

POINT I

THE ADOPTION BY THE COURT BELOW OF THE "REASONABLE SUSPICION" STANDARD FOR STRIP/BODY CAVITY SEARCHES OF MINOR OFFENSE ARRESTEES IS IN LINE WITH EVERY CIRCUIT DECISION WHICH HAS ADDRESSED THE ISSUE AND IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT.

Although it is true that this Court has not specifically ruled on the appropriate standard to be applied in fourth amendment challenges to strip/body cavity searches of minor offense arrestees, it is untrue that this Court has generally upheld the validity of such searches. In the case that petitioners rely upon for this proposition, *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that probable cause was not required to strip search an inmate who had been denied bail, after a contact visit. However, in reaching this conclusion this Court applied a "test of reasonableness" which required "a balancing of the need for a particular

search against the invasion of rights that the search entails". *Id.* at 559. Such a balancing of competing interests has been applied by this court to fourth amendment cases for many years.

In the years since *Wolfish*, ten different cases have come before six different circuit courts involving the validity of strip/body cavity searches of minor offense arrestees, and all have been decided consistently with the decision of the court below.[3] The only case which upheld this type of search since *Wolfish*, involved an arrestee for a violent felony.[4]

It is difficult to understand petitioners' contention that there is a split between the circuits on this issue. Although petitioners argue that in *Jones v. Edwards* the 8th Circuit upheld a search of an arrestee for resisting arrest and that the 5th Circuit did not adopt the "reasonable suspicion" standard in *Stewart*, these assertions prove erroneous when those decisions are reviewed.[5] Moreover,

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[3] See *Tinetti v. Wiltke*, 479 F.Supp. 486 (ED Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980) (per curiam); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Tikalsy v. City of Chicago*, 687 F.2d 175 (7th Cir. 1982); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Levka v. City of Chicago*, 748 F.2d 421 (7th Cir. 1984); *Hill v. Bogans*, 735 F. 2d 391 (10th Cir. 1984); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Stewart v Lubbock Co. Texas*, 767 F2d 153 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1378 (1986); *Ward v. Co. of San Diego*, 783 F.2d 385 (9th Cir. 1986).

[4] *Durfin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983).

[5] In *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985), the court held that the search of the plaintiff was unconstitutional. The court went on to state ". . . although the record suggests that Jones was uncooperative with officers, he was not charged with resisting arrest or with any sort of public misconduct which *might* justify a more intrusive search". 770 F.2d at 741-742 (emphasis added). It is apparently this dicta that petitioners mistakenly rely upon. In *Stewart* the court could not have been clearer in adopting the "reasonable suspicion" standard applied by the other circuits. 767 F.2d at 156-157.

in three substantially similar cases this Court has denied certiorari.[6] There is nothing presented in the present petition that warrants different treatment.

Finally, with regard to petitioners' contention that the court below erroneously disregarded the "evidence" submitted by the sheriff of contraband found on prisoners, this issue, being one of fact and evidence, is not appropriate for review by this court.

POINT II

THE COURT BELOW CORRECTLY DECIDED THAT THE COUNTY OF MONROE IS LIABLE IN DAMAGES TO MRS. WEBER AND THIS DECISION IS CONSISTENT WITH THIS COURT'S HOLDINGS IN MONELL AND PEMBAUR

In attacking the finding of the court below that the County of Monroe was liable under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) for the violation of Mrs. Weber's fourth amendment rights, Petitioners repeat a variety of factual and legal arguments, most of which were rejected by both courts below.

The argument most frequently repeated throughout the petition is that strip/body cavity searches of all arestees is mandated by the State of New York. The regulation that petitioners rely upon for this proposition (which is attached to the petition as page D-1) does not contain the words "strip" or "body cavity" anywhere. The district court noted in its decision that at oral argument counsel for Sheriff Meloni admitted that the policy was the Sheriff's interpretation of this regulation. (See page A-3 of

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[6] *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied* 105 S.Ct. 2114 (1985); *Stewart v Lubbock Co. Texas*, 767 F2d 153 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1378 (1986).

the petition).[7] In the context of the language used in the regulation, this was no major admission. Certainly this meritless argument, rejected out of hand by both courts below, is unworthy of this Court's precious time.

Similarly, the arguments made in the petition that the policy instituted by Sheriff Meloni, the chief law enforcement officer of the County, is not the County's policy; and that New York Law somehow preempts the Federal Constitution and Civil Rights Act and grants immunity to the County, do not present questions which this Court should review. The former is a mixed issue of law and fact which has been uniformly held against municipalities in similar situations.[8] The latter is so contrary to the basic tenets of our federal system of government as to be ludicrous.[9]

POINT III

THE ISSUE OF THE DENIAL OF QUALIFIED IMMUNITY TO THE SHERIFF IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

The petition also seeks review of the circuit court's judgment denying petitioner Meloni qualified immunity. The court below properly applied the test established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and held that at the time of the

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[7] The district court notes in the same sentence of its decision that the Sheriff's Attorney also claimed that other sheriffs in the state had interpreted the regulation in a similar way. No evidence was ever submitted in support of that statement, although it appears again in the petition. A review of *Sala v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979), *vacated*, 446 U.S. 903 (1980), indicates that several years prior to the date of that decision (1979), the County of Suffolk, New York had voluntarily discontinued the practice of strip/body cavity searching all arrestees.

[8] *See Pembaur v. City of Cincinnati*, 106 S.Ct. 1292 (1986); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985).

[9] *See Martinez v. California*, 444 U.S. 277, 284 n.8 (1980); *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

search, June 19, 1983, Mrs. Weber's fourth amendment rights were clearly established. Other circuits have reached the same conclusion.[10]

Moreover, on a petition for certiorari, in addition to showing an error of law by the court below it must also be shown that the utilization of this Court's time is justified on the ground that a substantial number of future cases will be impacted. A review of the cases from six different circuits cited above indicates that most municipalities have already abandoned the practice of routinely strip/body cavity searching all arestees. Accordingly, the odds are long indeed against a substantial number of other cases being presented where a similar search was conducted on a date in close enough proximity to June 19, 1983 to justify this Court's review of this issue.

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[10] *See Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985) (holding that such rights were clearly established as of April 30, 1981); *Ward v. Co. of San Diego*, 738 F.2d 1385 (9th Cir. 1986) (holding that such rights were clearly established as of May of 1981).

CONCLUSION

The court below properly decided all issues in this case in accordance with this Court's prior decisions and there is no conflict among any of the circuit courts of appeal which have addressed these issues. The other arguments of fact and law presented in the petition do not rise to a sufficient level of importance to justify the granting of this court's extraordinary and discretionary jurisdiction. The petition for certiorari should be denied.

FARACI, GUADAGNINO, LANGE & JOHNS
Counsel for Respondents
STEPHEN G. SCHWARZ, Esq.
(Counsel of Record)
300 Times Square Building
Rochester, New York 14614
Telephone: (716) 325-5150